STATE OF MICHIGAN

SUPREME COURT

ASSOCIATED BUILDERS AND CONTRACTORS, SAGINAW VALLEY AREA CHAPTER, a Michigan Non-Profit Corporation,
Plaintiff/Appellant,

-vs-

KATHLEEN M. WILBUR, Director of the Michigan Department of Consumer & Industry Services and NORMAN W. DONKER, Midland County Prosecuting Attorney,
Defendants/Appellees,
and

MICHIGAN STATE BUILDING & CONSTRUCTION TRADES COUNCIL,
Intervenor/Defendant/Appellee,
and

MICHIGAN CHAPTER OF THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., a Michigan Corporation, MICHIGAN MECHANICAL CONTRACTORS ASSOCIATION, a Michigan Corporation, and MICHIGAN CHAPTER OF THE SHEET METAL AIR CONDITIONING CONTRACTORS NATIONAL ASSOCIATION, a Michigan Corporation,
Intervenors/Defendants/Appellees,
and

MICHAEL D. THOMAS, Saginaw County Prosecuting Attorney,
Intervenor/Appellee.

Lower Docket Case No. 00-2512-CL-L

Court of Appeals Docket No. 234037

Supreme Court Case No. 124835

PLAINTIFF/APPELLANT'S CONSOLIDATED REPLY TO SUPPLEMENTAL BRIEFS

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **Page**

STATUTES **Page**

OTHER

I. INTRODUCTION

By Order of this Supreme Court dated September 17, 2004, the parties on appeal, including intervenor/defendants, have provided this Court supplemental briefs concerning the issue whether the Plaintiff/Appellant, Associated Builders and Contractors, Saginaw Valley Area Chapter ("ABC"), has standing sufficient to challenge the constitutionality of the Michigan Prevailing Wage Act, M.C.L. 408.551 *et seq.* ("PWA"). The supplemental brief submitted by the Attorney General on behalf of one of the original defendants (Director of the Department of Consumer and Industry Services ("CIS") (recently renamed the Department of Labor and Economic Growth)) and the supplemental brief submitted by the numerous intervenors (Saginaw Prosecuting Attorney Michael D. Thomas and several trade associations consisting of unions and unionized employers: MSBCTC, SMACNA, Michigan NECA, and Michigan MCA) raise faulty and misleading arguments which could result in misapplication of law by this Court in resolving the issue of ABC's standing to sue in this important case. Pursuant to M.C.R. 7.212(G), and in order that this Court is provided pertinent case law and proper analysis concerning ABC's standing to sue, ABC respectfully submits this Consolidated Reply Brief.

II. ARGUMENT

A. CONTRARY TO THE ARGUMENT OF DEFENDANT/APPELLEE, CIS, ABC *DOES* SATISFY THIS COURT'S TEST FOR STANDING FIRST ADOPTED IN LEE AND THEN AFFIRMED IN NATIONAL WILDLIFE FEDERATION, BECAUSE ABC HAS PROPERLY ALLEGED IN ITS COMPLAINT AND CAN SUPPORT THROUGH ITS SWORN AFFIDAVITS THAT IT MEETS ALL THREE TESTS FOR STANDING, SPECIFICALLY, THAT (A) ABC MEMBERS SUFFER INJURY-IN-FACT UNDER THE PWA, (B) THAT OPERATION OF THE STATUTE ITSELF (AND NOT THE CIS'S AMORPHOUS, EVER-EVOLVING ENFORCEMENT OF IT) CAUSES THE INJURY AND (C) THAT A JUDICIAL DECLARATION HOLDING THE PWA UNCONSTITUTIONAL AND UNENFORCEABLE WOULD REDRESS THE INJURY.

In its supplemental brief, the Director of the CIS ("Defendant/Appellee") essentially admits that the Court of Appeals dismissed ABC's case for lack of standing based on an

erroneous standard – that ABC "did not establish an actual or imminent threatened prosecution of its members." Nevertheless, it contends that ABC does not meet the requirements for standing even under the proper standards adopted by this Court. (See, Defendant/Appellee's Supp. Brief, p. 3 [hereinafter referred to as "Def/App's Supp. Brief"). Upon inspection, however, their analysis and application of facts to this Court's test for standing is entirely wrong.[1] On the other hand, ABC can show very clearly that it meets every prong of the test used by this Court for establishing standing under the circumstances of this case.

1. After Having had the Benefit of Briefing From the Parties and After Analyzing Pertinent Legal Precedent, the Trial Court Properly Determined That ABC's Affidavits Raised a Justiciable Controversy.

Attached as Exhibit A to this Brief is the fourteen page "Analysis" portion of Midland Circuit Court Judge Thomas L. Ludington's December 15, 2000, written Opinion finding a case or controversy in this present action. The Opinion was rendered after the Defendants/Appellees and Intervenors/Appellees raised questions of ABC's standing to sue. After full briefing in the matter, Judge Ludington provided an extensive and thoroughly researched analysis and application of pertinent federal and state case law on the issue of standing in the context of declaratory judgment actions. His Opinion was so thoroughly reasoned and supported in case law that none of the parties appealed the decision to the Court of Appeals. Nevertheless, that Court, without the benefit of any briefing on the matter, hastily issued an uninformed and erroneous decision that ABC lacked standing to challenge the PWA because it could not show an imminent prosecution of one of its members.

The Court of Appeals decision is wrong because it identifies the wrong standard for determining standing and misapplies the affidavits ABC has submitted in this case. By way of contrast, Judge Ludington in the Lower Court did apply the proper standard and correctly applied

[1] The Intervenors/Appellees make the same mistake at pages 6-20 of their supplemental brief.

ABC's affidavits. From pages 22 through 35 of his Opinion, Judge Ludington explains the historical origin of the requirement for standing – that it is based in constitutional principles of separation of powers as embodied in Article III's "case or controversy" requirement – in relation to actions for declaratory relief. He even includes a full discussion of the history of Michigan's declaratory judgment rule, M.C.R. 2.605, and examines how the rule is applied to constitutional challenges of criminal laws regulating commercial conduct. Citing several applicable cases, including the United States Supreme Court case of Babbitt v. United Farm Workers National Union, 442 U.S. 289; 99 S. Ct. 2301; 60 L. Ed. 2d. 895 (1979), and the Michigan Court of Appeals cases of Strager v. Wayne County Prosecuting Attorney, 10 Mich App 166 (1968), and Kalamazoo Police Supervisor's Assoc. v City of Kalamazoo, 130 Mich App 513 1983), Judge Ludington properly concludes at page 32 that Michigan's declaratory judgment rule represents the proper means by which a plaintiff who is directly regulated by a criminally enforced statute may challenge the constitutionality of the statute because the plaintiff's "future conduct would in fact be guided by the result of the litigation." Turning to the affidavits submitted by ABC in support of its case, the Court ruled at page 36:

> ABC has furnished the affidavits of Ronald Bauer, President of RCL Construction Co., Inc. and that of Richard Johnson, President of J.E. Johnson Contracting, both ABC members, articulating in paragraph 6 concrete risks of violations of the PWA as a result of allegedly random changes to PWA rates, the lack of definition of PWA projects and the absence of PWA statutory definitions for statutory language that may be material to enforcement of the criminal sanctions. As a result, this Court concludes that the risks of enforcement of the statute together with the asserted character of the potential for violations of the PWA, presents a justiciable controversy.[2]

Judge Ludington certainly got it right (and the Court of Appeals certainly got it wrong) when he analyzed ABC's affidavit testimony in relation to the case or controversy test of the declaratory judgment rule for attacking the constitutionality of the PWA. The PWA is a

[2] All of ABC's affidavits submitted to the trial court have been attached to this Brief as Exhibits B - F.

criminally enforced statute which requires all construction contractors (regardless of union affiliation) performing work on state-funded construction projects to alter their pay and benefit amounts and practices so as to conform to collective bargaining agreements between local unions and unionized contractors. M.C.L. 408.551 *et. seq.* Since ABC consists primarily of non-union construction contractors, Judge Ludington essentially recognized that the PWA is directed at regulating the conduct of ABC members in their profession – construction. Noting that Defendant Donker, who serves as Midland County Prosecutor, had acknowledged his obligation to enforce the PWA through criminal prosecution, the Judge concluded that ABC members must conform their business practices to this law or face the very real potential of criminal conviction. Accordingly, Judge Ludington properly held that ABC had produced sufficient affidavit testimony showing an actual case or controversy in that ABC members regularly alter their conduct in compliance with the PWA in order to avoid the risks of criminal prosecution. (Exhibit A, p. 36).

2. Since the Time Judge Ludington Authored his December 15, 2000, Opinion That ABC has Standing in This Case, the Michigan Supreme Court has Adopted the U.S. Supreme Court's Lujan Test for Standing – a Test Which Tracks Perfectly with the Opinion of Judge Ludington, but Which Stands in Stark Contrast to the Erroneous Decision of the Court of Appeals.

In Lee v. Macomb County Board of Commissioners, 464 Mich 726 (2001), the Michigan Supreme Court adopted a three-pronged test for standing first enunciated by the United States Supreme Court in Lujan v. Defenders of Wildlife, 504 U.S. 555; 112 S. Ct. 2130; 119 L. Ed. 2d. 351 (1992). After discussing the earlier rulings on the subject of standing by various Michigan Supreme Court justices, the Court held at 739-740:

> Perhaps the clearest template was set forward by Justice Cavanagh who, along with Justice Boyle, advocated adopting the United States Supreme Court's Lujan test. Lujan held:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly ... traceable to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Turning to the facts of that case, the Court found the plaintiffs lacked standing to pursue an action seeking to compel county commissioners to levy a tax to establish a veteran's relief fund because they failed to meet the first prong of the Lujan test – the "injury-in-fact" prong. Since the defendant commission enjoyed unfettered discretion not to award any funds to any particular individuals or groups, the plaintiffs could not show any particularized harm to them beyond that of ordinary citizens as a result of the defendant not levying a tax. *Id.* at 741.

Similarly, in the underlying Lujan case, the United States Supreme Court determined that those plaintiffs also lacked standing for failure to meet the "injury-in-fact" prong of the standing test. In that case, an organization dedicated to wildlife preservation sought to enjoin the Secretary of the Interior from implementing a rule which they believed might harm animal species around the world, thereby diminishing their members' ability to study and enjoy animals. The organization submitted affidavits of a couple of its members indicating that they had traveled to various regions of the world such as Africa and India in the past to study and enjoy crocodiles, leopards, elephants and other animals and that they hoped to do so again in the future. Finding this insufficient for an injury in fact, the Court ruled that even if the affidavits showed

that certain agency-funded projects threatened the listed species (which the Court labeled as "questionable"), the affidavits did not contain facts showing how damage to the species would produce "imminent" injury to the plaintiff's members. The Court reasoned: "that the women 'had visited' the areas of the projects before the projects commenced provided nothing ... [a]nd the affiants' profession of an "intent" to return to the places they had visited before – where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species – [was] simply not enough." *Id.* at 562-564.

The determination of ABC's standing is probably best accomplished by comparing the result in Lujan where plaintiffs lacked standing, with the result in another, very similar, United States Supreme Court case decided eight years later where plaintiffs possessed standing. In Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167; 120 S. Ct. 693; 145 L. Ed. 2d 610 (2000), a company operating a wastewater treatment facility was permitted to discharge treated water into a nearby river within certain restrictions. The plaintiff, an environmental watchdog group, alleged that the company had violated the restrictions and it sought declaratory and injunctive relief against the company in federal court. On appeal, the Supreme Court determined that the plaintiff had standing to sue based on the affidavits of certain members of the plaintiff organization. The affidavits showed that members either lived or recreated on or within only a mile or two of the affected river and that they refrained from using the river because of their "concern" about the harmful effects of the company's treated water discharged into the river. Another member testified that she believed her home was worth less than similar homes located farther down the river from the company and that the company's discharge into the river accounted for the lower value. Finding that the plaintiff documented an

injury in fact, the Court compared the facts underlying its determination with facts with those presented in Lujan. It held at 184:

> In contrast, the affidavits and testimony presented by FOE in this case assert that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests. These submissions present dispositively more than the mere "general averments" and "conclusory allegations" found inadequate in National Wildlife Federation. 497 U.S. at 888. Nor can the affiants' condition statements – that they would use the nearby North Tyger River for recreation if Laidlaw were not discharging pollutants into it – be equated with the speculative "'some day' intentions" to visit endangered species halfway around the world that we held insufficient to show injury in fact in Defenders of Wildlife. 504 U.S. at 564.

The Lujan case is instructive not only for showing the kind of remote and speculative injuries insufficient to establish standing (*e.g.*, as compared to the facts of Laidlaw), but also for its discussion of the type of cases where standing *is* easily established. Before applying the unique facts of the case to the three-pronged test for standing, the Court explained at 561-562:

> *When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or provided (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue.* ***If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.*** When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed.[3]

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[3] Of accord, consider the following passage taken from "Understanding Constitutional Law," 2nd Ed., 1999, by N. Redlich, J. Attanasio and J. Goldstein, pp. 27-28, which specifically explains this portion of the Supreme Court's Lujan decision:

> In the ordinary case, the question of standing is not difficult. A statute normally affects those subject to its provisions, who are directed to do, or to refrain from doing, specific things. Any person whose rights and obligations are thus directly affected has standing. Such persons against whom a law is specifically directed may be designated the *obvious parties plaintiff*, insofar as standing to challenge the law is concerned.
>
> Examples of "obvious parties plaintiff" come readily to mind. They include: landowners whose use of property is restricted by a zoning law; parents required to send children to public schools; ***a railroad company whose rates are fixed by statute***; teachers whose freedom of advocacy and association is limited by a law proscribing specified activities on their part; and a

As the Defendant/Appellee has pointed out, the Michigan Supreme Court has since affirmed Lee's adherence to the Lujan three-pronged standing test in its recent decision in National Wildlife Federation v. Cleveland Cliffs Iron Co., 471 Mich. 608 (2004). There, the plaintiff organization sought injunctive relief on behalf of its members to dissolve a land use permit issued to the defendant mining company by an agency of the State of Michigan. The plaintiff produced affidavits of its members showing their concern that the mining activity would irreparably harm their recreational and aesthetic enjoyment of the area where they regularly reside or recreate. One affiant also alleged an economic injury in that he believed the mining activity caused his well to go dry. Finding the facts and circumstances to be nearly identical to those presented in the U.S. Supreme Court Laidlaw case, the Michigan Court determined that the plaintiff had standing to sue. *Id.* at 629-630.

These four controlling cases, two from the United States Supreme Court and two from our Michigan Supreme Court, set forth the following succinct rules for determining standing[4]:

1. The plaintiff must show that he has suffered or will suffer an invasion of a legally protected interest which is concrete and actual as opposed to speculative;

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husband and wife whose right to use contraceptive devices is taken away by a statute prohibiting the use of such devices. (Emphasis added; Citations omitted).

These persons were the "obvious parties plaintiff," with standing to challenge the statutes involved in their cases, because they belonged to the classes against whom those statutes were specifically directed. The statues directly affected their right to use their property as they saw fit, or their personal right to engage in such activities as they chose. If any persons have a personal interest in challenging the statues, it is those who come squarely within their prescriptions-who are, in this sense, the subjects or, more accurately, the objects of the statutory provisions. Such persons clearly have a real and concrete interest in vindicating the claim that the statutory restrictions are invalid. (Citation omitted). The standing of an "obvious party plaintiff" – i.e., who belongs to the class at which the statutory prescriptions are aimed – presents little problem. Lujan, 504 U.S. at 561-562.

[4] All parties agree that an organization, such as ABC, has standing to sue in the interest of their members where such members would have standing as individual plaintiffs. National Wildlife, supra at 629, citing Trout Unlimited, Muskegon White River Chapter v. White Cloud, 195 Mich App 343, 348 (1992) and Karrip v. Cannon Township, 115 Mich App 726, 733 (1982). (See, Intervenors/Appellees' Supp. Brief at p. 6. [hereinafter "Int/App's Supp. Brief])

2. The plaintiff must show that there is a causal connection between the injury and the conduct complained of, and not that the harm is the result of some independent action of a third party not before the court;

3. The plaintiff must show that the injury would be redressed by a favorable decision; and

4. When the suit is one challenging the legality of government action regulating the conduct of the plaintiff as opposed to the conduct of a third party, "there is ordinarily little question that the [government] action ... has caused him injury and that a judgment preventing ... the action will redress it." Lujan, *supra* at 561-562.

In the case before this Court, all three prongs of the Lee/Lujan test are easily met, especially given the presumption of standing where a plaintiff (such as ABC) is the direct subject of the government regulation being challenged (like the PWA).

The first prong requires an injury in fact. Again, an injury in fact is ordinarily met where the government action at issue is aimed at the conduct of the plaintiff, whereas an injury in fact is more difficult to show where the government action concerns the conduct of a third party. Lujan, *supra*, 561-562. The Court of Appeals completely missed that the former applies here. The undisputed purpose of the Michigan legislature in enacting the PWA was to require all contractors regardless of union affiliation to conform their pay and benefit practices to those of union contractors on state-funded construction projects. M.C.L. 408.552 and 408.554. Clearly, the law is aimed directly at regulating the conduct of non-union construction contractors. Moreover, because the statute is by its plain terms enforced by criminal prosecution, M.C.L. 408.557, failure by ABC members to properly adhere to the strictures of the statute results in the potential for criminal prosecution.

ABC contends that the PWA is both unconstitutionally vague and delegates to unions and unionized contractors the authority to manipulate the statute in their favor at the expense of ABC member contractors. Thus, each time an ABC member wins a bid on a PWA job, he is forced to

either comply with the law he believes is unconstitutional or forego work. (Exhibit B, pp. 4-7; Exhibit C, pp. 3-5; Exhibit D, pp. 3-5; Exhibit E, pp. 3-5, 10-11; Exhibit F, pp. 3-10). It is this forced compliance with an unconstitutional law that itself constitutes the injury to ABC members each time they perform work on a PWA project. Alternatively, it is the forbearance of such work and the loss of income which constitutes injury. In either case, the presumption that ABC members are injured by operation of the PWA applies in this case because the statute is aimed directly at regulating the conduct of ABC members in the performance of government funded construction projects.

Even without benefit of the aforementioned presumption first recognized by the United States Supreme Court in Lujan, ABC easily meets the three-pronged test for standing when the facts of this case are compared to the precedent cited from both the Michigan and United States Supreme Courts. In both Laidlaw and National Wildlife, *supra*, at 183-184 and 629-630 respectively, the plaintiffs were found to have standing where they could show by affidavits that they engaged in certain conduct such as bird watching, canoeing and picnicking at a particular outdoor area and that the area was altered by a third party in such a way as to limit or otherwise interfere with their concrete plans to continue to engage in those aesthetic activities. Affidavits of association members were also submitted in both cases alleging that certain members suffered economic harm allegedly attributable to the defendants (diminished value of a home in Laidlaw and a dry well in National Wildlife). *Id.* In the same way that the environmentalists in Laidlaw and National Wildlife regularly enjoyed strolling along the banks of a pristine river watching the birds and/or regularly enjoyed the full economic value of their homes or wells, ABC members have historically and regularly enjoyed the commercial freedom and economic benefits of performing work on state-funded construction projects. (Exhibits B-F). Like the plaintiffs in

Laidlaw and National Wildlife who saw their interest in the beauty of the river and the birds or their interest in their homes or wells allegedly harmed by industrial discharge in the river from a nearby company, ABC members have seen their freedom to pay their existing wages and benefits and to follow their existing practices (and the economic benefits that spring from this freedom) substantially interfered with by a law requiring them on state-funded projects to alter such practices in conformance with the "union way" of doing things. (Exhibits B-F). This compelled conformance to union practices is all the more detrimental to ABC members because the criminally enforced PWA is unconstitutionally vague and controlled by the non-union competitors to ABC members in the construction industry. The clarity of the injury to ABC members is probably most evident by the fact that the vagueness of the law and the unbridled control of it exerted by unions and unionized contractors has led some ABC members to curtail or even refuse to bid on these projects for fear of potential criminal prosecution. (Exhibit B).[5] Certainly, if bird watchers and picnickers suffer an injury in fact when their favorite outdoor locations are alleged to have been threatened, ABC members suffer an injury in fact when they are forced by a Michigan statute applicable to state-funded construction projects to change their business practices to fit the vague and confusing schemes of unions and unionized contractors or face potential criminal prosecution.

Due to their silence, it appears that the Defendant and Intervenors/Appellees have conceded that ABC meets the second and third prongs of the three-part Lee/Lujan test. Even so, ABC can affirmatively demonstrate that it meets those prongs as well. Again, because ABC

[5] This Exhibit consists of the affidavit of Richard Johnson, then-President of J.E. Johnson Contracting, Inc., an ABC member. He attested that his company is required by force of law to significantly alter its work practices on PWA projects and that, due to fear of violating the numerous vague rules of the PWA resulting in potential criminal prosecution, his company has dramatically reduced its bidding on such projects. (See p. 4, parags. 7-8). He also attested that from 1994 through 1997 when the PWA was held by the federal district court to be unenforceable, his company increased its bidding on such projects because the administrative burdens, extra costs and fear of criminal prosecution no longer existed on such projects. See p. 5-6, parags. 9-13).

members are the focus of the PWA's requirements, there is "little question that the [government] action ... has caused [ABC members] injury and that a judgment preventing ... the action will redress it." Lujan, supra at 561-562. As to the causation prong, it is clear that *but for* the applicability of the PWA to ABC members on state-funded construction projects, ABC members would be free to continue paying their employees as they ordinarily would on any other type of job. The PWA requires and, thus, *causes* ABC members to alter their business practices on PWA projects or face criminal prosecution. (Exhibits B-F). As to the redressability prong, there is no doubt that invalidation of the PWA would allow ABC members to perform state-funded construction work without the administrative hassle, economic detriment and emotional worry brought to bear by this unconstitutional, criminal law. (Exhibits B-F). Simply put, removing the PWA from the books removes the harm to ABC members.

Instead of applying the facts of this case to the three prongs of the Lee/Lujan test, the Defendant/Appellee first identifies Lee's adherence to the Lujan test, then mention that that Court of Appeals didn't apply that test, and finally argue that the affidavits submitted by ABC don't equate to an actual or imminent *prosecution* of ABC members. (Def/App's Supp. Brief, pp. 2-6). ***Incredibly, like the Court of Appeals, they completely ignore any application whatsoever of the Lee/Lujan test!*** The test is not whether there is an actual or imminent *prosecution* of ABC members – the test is whether there is actual or imminent *harm* to ABC members. The fact that the PWA constitutes legislation directed at the conduct of non-union construction contractors requiring ABC members to conform to union pay practices is enough for actual harm under Lee and Lujan. All ABC needs to show is that some of its members have performed and have concrete plans to continue performing PWA work, that they are restricted in their conduct by operation of the PWA on such jobs, and that removal of the PWA would allow

them to perform such work as they would any other job. Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d. 586 (1993). As found by the circuit court, ABC has done this with affidavit support. (Exhibits B-F).

Even if the Defendant/Appellee would have properly framed its argument in Lee/Lujan terms – that the harm (not necessarily prosecution) the PWA causes to ABC members is too speculative and remote to constitute an injury-in-fact – and then compared the facts of the present case to the facts of the Lujan and Lee cases where an injury-in-fact was missing, they still would not have been able to call into question ABC's obvious standing to sue. In Lujan, a case where the government regulation was *not* aimed at the plaintiffs, the U.S. Supreme Court easily determined that the animal preservation activists did not have standing to sue because they could only presume that animals they wished to observe on the other side of the planet would be harmed and because they had no concrete plans to visit those remote areas at any point in the foreseeable future. *Id.* at 564. Again, comparing this speculative and non-imminent complaint to the plight of the environmentalists in Laidlaw, the U.S. Supreme Court ruled in Laidlaw at 629:

> In contrast, the affidavits and testimony presented by FOE in this case assert that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests. These submissions present dispositively more than the mere "general averments" and "conclusory allegations" found inadequate in [Lujan]. Nor can the affiants' condition statements – that they would use the nearby North Tyger River for recreation if Laidlaw were not discharging pollutants into it – be equated with the speculative " 'some day' intentions" to visit endangered species halfway around the world that we held insufficient to show injury in fact in [Lujan].

Unlike the plaintiffs in Lujan, ABC *is* the target of government regulation because the PWA requires non-union contractors on state-funded construction projects to conform to union pay

amounts and practices. Unlike the plaintiffs in Lujan, ABC members have regularly engaged in the activity being regulated and will continue every day to engage in the activity (Exhibits C-F), although at least one has dramatically curtailed such work due to the harm the law presents and the criminal sanction the law carries (Exhibit B). There simply is no comparison between the factual circumstances underlying ABC's case and the weak factual case brought by the plaintiffs in Lujan. Perhaps that explains why neither the Court of Appeals nor Defendant/Appellee attempted it.

ABC has sued the State of Michigan once before relative to the enforceability of the PWA.[6] ABC obviously had standing to sue in that case. In short, ABC has had previously, and continues to have currently, standing to challenge the constitutionality of the PWA because its members regularly perform state-funded construction work and each time they do so they are forced by law to reform their pay practices to those required under the PWA. (Exhibits B-F). As the authors of "Understanding Constitutional Law," 2nd Ed., *supra*, would say, ABC is an "obvious party plaintiff" in this case by virtue of the PWA's direct regulation of ABC members. Accordingly, and as Judge Ludington properly determined, ABC has standing to challenge the constitutionality of the PWA on behalf of its harmed members.

B. THE INTERVENORS/APPELLEES' SUPPLEMENTAL BRIEF RAISES A SERIES OF NEW FAULTY ARGUMENTS AND ALLEGED "FACTS" IN A DESPERATE ATTEMPT TO MISDIRECT THIS COURT'S ATTENTION AWAY FROM THE PROPER RESOLUTION OF THE COURT OF APPEALS' ERRONEOUS RULING DISMISSING ABC'S CASE FOR LACK OF STANDING AND, THEREFORE, A REPLY IS NECESSARY.

[6] In Associated Builders and Contractors v. Perry, 1994 US Dist Lexis 8437 (ED MI 1994), *rev'd other grounds*, 115 F3d 386 (6th Cir 1997), the same plaintiff in the present case brought a declaratory action in federal district court seeking to have the PWA declared unenforceable based on federal preemption under ERISA. The federal district court agreed with ABC and ruled the statute unenforceable in 1994. That decision was eventually overturned on appeal three years later.

In addition to a passing reference to application of the Lee/Lujan test for standing, the Intervenor/Appellees have put forth various other arguments and "facts" in their efforts to support the erroneous decision of the Court of Appeals. ABC will address those arguments one by one.

1. The Fact That the Business of one of ABC's Affiants has Closed Since This Case was Appealed Does not Render the Affidavit Ineffective and, Even if it Does, ABC has Submitted Numerous Other Affidavits Upon Which it May Properly Rely for its Standing.

At page 6 of their brief, the Intervenors/Appellees contend that, to the extent ABC bases its associational standing on the standing of General Electric Contracting and the affidavit of its owner Mr. Gary Tenaglia (Exhibit F), the case is moot because that company has since gone out of business. Yet, other than the Hunt v. Washington State Apple case, *supra,* (which holds simply that an association has standing where at least one of its members would have standing), the cases cited do not involve associational standing issues and are, therefore, readily distinguishable.[7] With respect to Mr. Tenaglia's affidavit, it was offered to support the fact that ABC members have been threatened with criminal prosecution under the PWA in the past. Of course, since the Court of Appeals' "imminent or threatened prosecution" is not the appropriate test for standing, Mr. Tenaglia's affidavit, even if it is determined to be irrelevant for his company having gone out of business, is not of consequence to ABC's standing. The five other

[7] In Board of License Comm'rs of Tiverton v. Pastore, 469 U.S. 238; 105 S. Ct. 685; 83 L. Ed. 2d. 618 (1985), the singular individual plaintiff tavern had its liquor license revoked and challenged the ruling. During the appeal, it went out of business. The case became moot because the third prong of the Lujan standing test – redressability – could not be met due to the fact that a tavern no longer in business would gain nothing from having its liquor license restored. *Id.* at 239. Similarly, in Arizonans for Official English v. Arizona, 520 U.S. 43; 117 S. Ct. 1055; 137 L. Ed. 2d. 170 (1997), the holding did not turn on associational standing issues. In that case, an individual Spanish-speaking plaintiff was successful in her declaratory action but denied injunctive relief when she challenged the constitutionality of Arizona's "English-only" rule in government employment. She appealed the lack of remedy and then promptly quit her job as a public employee to go to work in the private sector. The Supreme Court held that a case or controversy no longer existed at that point. Interestingly, the Court discussed, but did not rule on, whether the association known as Arizonans for Official English had standing to defend the constitutionality of the statute at the appellate level.

affidavits submitted to the trial court (and to this Supreme Court as Exhibits B-E) are more than sufficient to demonstrate injury in fact to ABC members under the applicable Lee/Lujan test for standing.

2. ABC Does not Need to Show That any of its Members Have Violated or Plan to Violate the PWA in Order for ABC to Have Standing.

At pages 7-20, the Intervenors/Appellees contend that ABC cannot proceed to Court seeking declaratory relief without showing an imminent prosecution of one of its members or at least that one of its members plans to violate the PWA. Yet, the only case cited by Intervenors/Appellees that has some application in support of their argument that at least one ABC member must play the role of "sacrificial lamb" [8] is Thomas v. Anchorage Equal Right Comm'n, 220 F. 3d. 1134 (9th Cir. 2000), *en banc*. As a preliminary matter, Thomas is an obscure decision from the often reversed Ninth Circuit. The case stands in stark contrast to those of all other state and federal courts [9] which have dealt with this precise issue. This most certainly

[8] Apparently, the Intervenors/Appellees would have at least one ABC member sign an affidavit swearing under oath that: "I as an ABC member will deliberately violate the criminal PWA and thereby subject my company to debarment and myself personally to criminal prosecution so that my organization can challenge whether the law is constitutional or not."

[9] As recognized by Judge Ludington at page 28 of his Opinion quoting Strager v. Wayne County Prosecuting Attorney, 10 Mich App 166, 170-171 (1968): "A declaratory action is a proper remedy to test the validity of a criminal statute where it affects one in his trade, business or occupation. To afford a businessman relief in such a situation without having first to be arrested is one of the functions of the declaratory judgment procedure. (Citations omitted). Significantly, other cases from the U.S. Supreme Court have similar holdings. In Doe v. Bolton, 410 U.S. 179, 188; 93 S. Ct. 739; 35 L. Ed. 2d. 201 (1973), the Supreme Court held that physicians had standing to challenge a criminally enforced abortion law regulating their conduct "despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes." Likewise, in Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298; 99 S. Ct. 2301; 60 L. Ed. 2d 895 (1979), the Court held that a union had standing to challenge a law's constitutionality where it alleged that it might inadvertently violate it, alleged "an intention to continue" activities that might violate it, and the state had not "disavowed any intention" to prosecute, even though the penalty had never been applied to the kind of conduct at issue. See, also, Steffel v. Thompson, 415 U.S. 452; 94 S. Ct. 1209; 39 L. Ed. 2d. 505 (1974), in which the Court held that an actual controversy was presented as required under the federal Declaratory Judgment Act and that it was not necessary that the plaintiff first expose himself to actual arrest or prosecution to be entitled to challenge the constitutionality of a statute.

explains why no other court outside the Ninth Circuit has ever followed the Thomas criminal prosecution standing analysis.

As is plainly evident from the Lee/Lujan analysis, the proper test for an injury-in-fact brought by a plaintiff challenging by declaratory action the constitutionality of a criminal statute aimed directly at regulating the plaintiff's conduct is not whether the plaintiff has defied the law and found himself facing "imminent prosecution," but whether the plaintiff has and will continue to be required to regularly conform himself to the strictures of that law in order to avoid criminal prosecution. Under the Ninth Circuit's "imminent prosecution rule," which a panel of our Court of Appeals apparently wants to follow in this case, a plaintiff is placed unnecessarily in an unjustly oppressive predicament, because he must either resign himself to living with the harm that naturally flows from an unconstitutional law regularly altering his conduct, or he must risk prosecution by violating the law and then win the challenge. The first option is unacceptable because unconstitutional regulation of conduct is abhorrent to our system of justice. The second option is equally unacceptable because it is grossly unfair to *require a person to risk his or her freedom* simply in order to have the courts pass judgment on whether the person is being directly regulated by the government in an unconstitutional manner. Thus, the Ninth Circuit's rule virtually assures that law-abiding Michiganians will never challenge the constitutionality of the laws directly regulating their conduct, even though they believe to their core that the law regulating them violates constitutional principles, because law-abiding persons follow the laws as written.[10]

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[10] In addition to the very obvious notion that a litigant, particularly a criminal litigant, need not forego one constitutional protection to advance another, serious questions are raised as to when if ever a plaintiff, such as ABC, would be able to bring a declaratory action for prospective relief from a criminal statute under the Ninth Circuit's "genuine threat of criminal prosecution" standard. Thomas at 1139. The effect of this "Hobson's choice" offends not only those who fall directly subject to a particular constitutionally-suspect law, but it is also repugnant to our system of constitutional justice. While apparently fashioned to avoid impermissible intrusion by the judiciary into the power of the legislature, such a rule actually results in the impermissible abandonment of a check on the power

In addition, the Ninth Circuit's flawed reasoning impermissibly creates a higher burden for a plaintiff to show standing when challenging a criminally enforced law as opposed to a civilly enforced law to the contrary. The U.S. Supreme Court in Lujan, *supra* at 561, (and Michigan Supreme Court through Lee, *supra*) actually presumed standing under these circumstances, recognizing that:

> "[w]hen the suit is one challenging the legality of government action or inaction ... in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed.

Thus, in cases involving direct government regulation of a plaintiff, the burden of showing standing is easier ("ordinarily little question") – not harder – to meet. When the government regulation includes criminal penalties for noncompliance by the directly-regulated plaintiff, it stands to reason that the burden of showing standing would be even easier to meet. Not so, according to the Ninth Circuit in Thomas and the Michigan Court of Appeals in the present case. According to their questionable reasoning, the burden becomes *heavier* for the directly-regulated plaintiff because he is required to violate the law and face an "imminent prosecution" before having standing to sue. These decisions reflect not only failure on the part of those Courts to recognize the "directly-regulated plaintiff presumption" articulated in Lujan, but also a failure to recognize that the threat of criminal penalties heightens – not lessens – the harm to the directly-regulated plaintiffs. The imprudence of these holdings becomes even more readily apparent when contrasted by the fact that both the U.S. and Michigan Supreme Courts have held that environmental plaintiffs (e.g., bird watchers and picnickers) who were ***not*** the target of ***civilly***

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of the legislature! If the Michigan courts were to follow the Ninth Circuit's "genuine threat of criminal prosecution rule," our legislature could enact a whole host of questionable laws regulating private conduct and effectively keep them from constitutional review by the judiciary simply by affixing criminal penalties to them.

enforced governmental rules nevertheless had standing to challenge the action when their environmental interests were threatened. Laidlaw and National Wildlife.

The other cases cited by the Intevenors/Appellees are also readily distinguishable and of no relevance. In Blakely v. United States, 276 U.S. 853 (6th Cir. 2002), the Sixth Circuit Court of Appeals determined that individuals who owned an art exhibition company which had been prosecuted for illegally "structuring" its banking transaction in the past could not retroactively challenge whether the statute prohibiting such transactions violated due process without showing that it was presently structuring its loans in violation of the statute. The ABC case is obviously very different because ABC members are not seeking to retroactively challenge past enforcement of the PWA. Moreover, unlike the indirect rare application of banking laws to art exhibitors, the PWA is aimed at directly regulating the regular business conduct of ABC members. In Grendell v. Ohio Supreme Court, 252 F. 3d. 828 (6th Cir. 2001), the Sixth Circuit Court of Appeals examined whether an attorney who had once been sanctioned by the Ohio Supreme Court for maintaining a frivolous action had standing to challenge the constitutionality of the Court's sanction rule afterward.[11] Examining the facts, the Blakely Court ruled the plaintiff could not show a significant possibility of future harm because it was too speculative that he would again have a suit before the Ohio Supreme Court, that the suit would be frivolous, and that the Court would, in its discretion, impose sanctions. *Id.* at 833. ABC's case is much more immediate and concrete. Unlike the rarity of a single attorney having a frivolously sanctioned case before a state supreme court, ABC members perform work on PWA projects on a regular, if not daily, basis. Unlike an attorney who has control over the merits of the cases he files, each time an

[11] The intervenors/appellees also rely on Johnson v. State of Missouri, 142 F. 3d. 1087 (8th Cir. 1998). The facts, analysis and holding of that case are virtually identical to those found in Grendell and, therefore, that case will not be specifically addressed by ABC in this brief.

ABC member sets foot on a PWA project, he must alter his pay and benefit practices as a matter of law. Unlike the discretionary application of the sanction rule by the Ohio Supreme Court, violations of the PWA are to be prosecuted as a matter of course by county prosecutors. M.C.L. 408.557.[12] There simply is no valid comparison between the present case and the Blakely, Grendell or Johnson cases.

3. The CIS's "Recent Policy Development" to Move Away From Criminal Referrals to Increased Civil Penalties, Does not Render This Case Moot for Review and, Indeed, Only Serves to Heighten ABC's Standing to Pursue its Claims.

At page 20 of their brief, the Intervenors/Appellees contend that ABC's case is moot because "recent CIS policy changes by [the CIS] have made the possibility of criminal prosecution non-existent." In support of this proposition, Intervenors/Appellees reference a new policy which indicates that the CIS will in most non-compliance cases no longer refer the matter to local prosecutors, but will instead pursue increased civil penalties through debarment procedures pursuant to Executive Order 2003-1. This argument is factually and legally incorrect for a plethora of reasons. First, the Intervenors/Appellees state that the threat of criminal prosecution is now "non-existent" and then immediately state in the next sentence (footnote 8) that the CIS will still refer matters to local prosecutors if they involve failure of a contractor to produce records. Obviously, the Intervenors/Appellees have, thus, *admitted* that a threat of prosecution *still exists*. Second, the new policy merely concerns CIS "referrals" to prosecutors – it does not indicate that local prosecutors no longer have the authority to seek criminal convictions for alleged violations of the PWA. Third, there is no indication that each of the prosecutors in the numerous counties in Michigan has abandoned their intentions to enforce the statute through criminal means. To the contrary, all indications are that the PWA will continue

[12] "[A] plaintiff may justifiably assume public officials will do their duty." Strager, *supra*, at 172.

to be enforced by prosecutors. Intervenor/Appellee Thomas, who serves as the Saginaw County Prosecutor and who intervened in this case to preserve his option to criminally prosecute violators of the PWA, has admitted before the Court of Appeals that he has not abandoned his enforcement authority. (Exhibit A, p. 36). Finally, the CIS "non-referral" policy doesn't prevent others, such as an individual or a union or a unionized contractor, from making their own complaints of a violation of the PWA to a local prosecutor.

Even if a state agency could unilaterally repeal the criminal enforcement provisions from a state law in favor of increased civil penalties (which it obviously cannot), it would not in any way lessen ABC's standing. The Lee/Lujan test for standing is met by virtue of ABC members being forced on a regular and ongoing basis to alter their pay and benefit practices on state-funded construction projects. The test is not whether ABC members face an "imminent prosecution" should they fail to comply. The criminal nature of the law merely heightens the harm to ABC members – it does not represent the entirety of the threatened harm. Additionally, the CIS's move to civil enforcement of the PWA through a debarment procedure only serves to strengthen, not weaken, ABC's standing to sue, because ABC members now have another real worry when performing PWA work – debarment from prospective state contract work should they violate the PWA.

4. The CIS's "Recent Policy Development" Concerning a Revised Methodology for Surveying Prevailing Wage Rates, Does not Render This Case Moot for Review, but has Actually Enhanced ABC's Standing, as This New Policy Substantiates ABC's Claims That it is Subjected to an Unconstitutionally Delegated Statute.

At page 22 of their brief, the Intervenors/Appellees contend that injury traceable to ABC's unlawful delegation claim is currently non-existent because the CIS now "requests" that unions provide wage rate information not just from collective bargaining agreements, but also

from other understandings with unionized contractors and to identify which has been used the most frequently in the immediately preceding 60 day period. These "new facts" do nothing more than demonstrate that ABC is correct in its underlying claim that the PWA is fundamentally flawed as an unconstitutional delegation of legislative authority to private third parties with an interest in the statute. After ruling that ABC had standing to sue (and that the Intervenors had standing to intervene), Judge Ludington was presented a motion for summary disposition on ABC's claims. At page 32 of his written Opinion, he correctly observed that the collective bargaining process has to be sufficiently independent of the PWA to guard against arbitrarily inflated wage rates on public projects.[13] He then concluded that ABC had come forward with support for its assertions that unions and unionized contractors were presently negotiating their contracts with at least two sets of rates – some applicable to and others not applicable to PWA projects, thus resulting in arbitrarily inflated PWA rates. (March 20, 2001, Opinion at 34). The CIS's new survey request (as found attached to Int/App's Supp. Brief as Exhibit 4) constitutes nothing more than an *admission* that unions and unionized contractors have established and continue to establish different rates for PWA work and non-PWA work. This certainly is not a circumstance contemplated by the legislature when it enacted the PWA and one which demonstrates the unconstitutionally delegated flaw which is endemic to this statute.

Just like the statute found to be constitutionally suspect in General Electric v. New York, 936 F. 2d. 1448 (2nd Cir. 1991), discussed at length in ABC's brief to the trial court and relied upon by Judge Ludington in his March 20, 2001, Opinion at pages 33-34, the Michigan PWA is constitutionally flawed because it grants authority to unions and unionized contractors to

[13] Judge Ludington's March 20, 2001, Opinion on plaintiff's and all defendants' motions and cross-motions for summary disposition is not attached to the supplemental brief as an exhibit. As Judge Ludington's December 15, 2000, Opinion concerning ABC's standing is at issue in these immediate proceedings, only that Opinion has been attached as Exhibit A.

manipulate the statute in their favor. What was said of the New York statute applies with equal force to the Michigan PWA, as is clearly revealed by the CIS's new wage survey system:

> What seems to have occurred is that the unions and the local electrical contractors association negotiated their agreements fully aware of the impact their contracts would have on the prevailing wage applied to public works projects in the locality, and that those wage rates were then manipulated to the mutual advantage of both the unions and the employers. (General Electric at 1457).

As a result of the alleged wage rate manipulation that the New York statute referenced for purposes of its prevailing wage act, the General Electric Court concluded:

> If this is in fact what occurred – and we express no view as to whether it did or did not – **then neither side was forced to curb its self-interest, and the rate set in the agreements are potentially arbitrary because they reflect not the wage rates of an adversarial marketplace, but the wage rates in a setting skewed by the bargaining parties' knowing use of their agreement to achieve selfish ends. It would be difficult to measure how distorted the resulting rates are because the rates depend on subjective factors such as the amount of public versus private sector work each party, at the time they were negotiating, thought would be contracted for the term of the agreement; but this perversion could be endemic to the system as GE asserts.** In fact, the false light could be such that for the state to use only these privately-negotiated agreements would make it literally impossible for it fairly to set prevailing wage and supplement rates. **It is this potential – that a system which relies solely on such privately-negotiated agreements will consistently fail to produce non-arbitrary wage and supplement rates – that makes GE's facial attack on the statute viable.** (emphasis added) (General Electric at 1457 and 1458).

At the circuit court level, Judge Ludington found that ABC had standing and, further, "met its burden of coming forward with some evidence that the PWA wage and benefit provisions may not be the product of an adversarial marketplace." (March 20, 2001, Opinion at p 34).[14] Over three and a half years later, the CIS now apparently

[14] Indeed, while the present case has lingered on appeal, ABC has found, without the benefit of any formal discovery, that the International Brotherhood of Electrical Workers, Local 692, and Intervenor, Michigan NECA,

recognizes that which ABC contended before Judge Ludington, and which Judge Ludington found – that ". . . the unions and the local electrical contractors association negotiated their agreements fully aware of the impact their contracts would have on the prevailing wage applied to public works projects in the locality . . .." General Electric at 1457. Why else would the CIS adopt the new wage survey policy which very clearly recognizes that multiple wage rates are, in fact, in play and that anytime there is more than one wage rate, it can affect the legal standard to be incorporated into the PWA. To the extent that ABC can show that it is subjected to regulation by a statute which, by **necessity**, incorporates a two tier wage system like that found to be unconstitutional in General Electric, so too has ABC satisfied all notions of standing to pursue its unconstitutional delegation of legislative authority claim.

Dated this 4th day of November, 2004

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have developed a website which includes job targeting information demonstrating two-tiered wage rates of the sort that artificially and arbitrarily drives up the cost of PWA projects. The information on the site (Exhibit G) shows that the union maintains not only different rates to apply to specific jobs it wants targeted, but also that the union retains discretion to determine whether the lower rates will apply as to any particular project. The Letter of Understanding dated May 31, 2004, states in this regard as follows: "On specific projects receiving prior approval by the Business Manager or his designee, the following special terms and conditions will apply for the duration of the project … ." This is precisely the kind of collusive conduct which results when a statute, like the PWA, unlawfully delegates legislative authority to private third parties with an interest in the statute.